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Ms. Marlene H Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, DC 20554

Re: *Developing a Unified Intercarrier Compensation Regime* (WC Docket No. 01-92); *Intercarrier Compensation for ISP-Bound Traffic* (WC Docket No. 99-68); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (WC Docket No. 96-98)

Dear Ms. Dortch:

Qwest Communications International, Inc. ("Qwest") respectfully submits this letter in the above-captioned dockets. It is Qwest's understanding that the Commission may be nearing a decision in response to the D.C. Circuit's second remand of the intercarrier compensation rules for ISP-bound traffic. *See WorldCom v FCC*, 288 F.3d 429 (D.C. Cir. 2002) (remanding, but declining to vacate, Order on Remand, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 16 FCC Rcd 9151 (2001)).

Given the length of these proceedings and the extremely large number of filings, Qwest submits this letter to call the Commission's attention to four prior filings that are especially relevant to the Commission's decision. Those filings provide a strong legal foundation for maintaining the transitional bill-and-keep regime for ISP-bound traffic established in the *ISP Remand Order* pending resolution of the broader Intercarrier Compensation proceeding.

Qwest expresses its concern that the Commission may be considering reversing its earlier decisions and ruling that ISP-bound traffic is subject to the payment of reciprocal compensation. The Commission has previously found in no uncertain terms that allowing carriers to collect reciprocal compensation for ISP-bound traffic had seriously undermined the robust local competition that "Congress . . intended to facilitate with the 1996 Act."[1] The Commission also formally found, based on years of experience and an extremely thorough record, that subjecting ISP-bound traffic to reciprocal compensation led to massive amounts of "classic regulatory arbitrage"[2] under which "viable, long-term competition among efficient providers of local

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[1] Order on Remand, *Implementation of the Local Competition Provisions of the in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, 9162 ¶ 21 (2001) ("*ISP Remand Order*").

[2] *Id*

exchange and exchange access services cannot be sustained."[3] To reverse course now and rule that carriers *should* be permitted to charge reciprocal compensation for this traffic would be to take the exact course of action that the Commission previously held would undermine Congress's purpose in adopting the Act.

In addition, for the Commission to shift course in the face of a factual record that it has already found to overwhelmingly support its previous conclusions would not be lawful and would subject the Commission to yet a third reversal by the D.C. Circuit. Moreover, that record has not been supplemented since the last round of comments on compensation for ISP-bound traffic was filed more than two and a half years ago — before the *WorldCom* decision was even issued. The Commission could not reverse its findings on the impact of reciprocal compensation for ISP-bound calls or its compensation rules for ISP-bound traffic without, at a minimum, receiving an additional round of comments and analyzing whether the record as supplemented would support such a drastic reversal.

I. A Bill-and-Keep Compensation Regime is Permissible Even if Section 251(b)(5) Applies to ISP-Bound Traffic.

Qwest previously submitted four filings in the above-captioned dockets that provide the Commission with legal, economic and policy rationales for the continuation of the current rules for ISP-bound traffic: (1) a November 22, 2000 white paper entitled *A Legal Roadmap for Implementing a Bill and Keep Rule for All Wireline Traffic* ("*White Paper*"); (2) Qwest's November 5, 2001 reply comments in WC Docket No. 01-92 ("*Reply Comments*"); (3) Qwest's November 12, 2001 *ex parte* submission including an analysis by Dr. William E. Taylor, *et al.* entitled, *An Economic and Policy Analysis of Efficient Intercarrier Compensation Mechanisms for ISP-Bound Traffic* ("*1999 Ex Parte Submission*"); and (4) an October 26, 2000 Letter from John W. Kure to Magalie Roman Salas containing further analyses by Dr. Taylor ("*2000 Ex Parte Letter*"). Copies of these filings are enclosed for the Commission's convenience. These submissions provide support for the current intercarrier compensation rules and are consistent with the D.C. Circuit's decision in *WorldCom* and its prior ruling in *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

Qwest continues to believe that ISP-bound traffic falls outside the scope of section 251(b)(5) and hence is not even potentially subject to reciprocal compensation under that section. *See White Paper* at 5-10. The D C Circuit decision in *WorldCom* did not remove this option for the Commission, instead, it simply held that the Commission, by relying on a transitional

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[3] *Id* at 9183-84 ¶ 71. *See also id* at 9154-55 ¶¶ 4-5 (finding that reciprocal compensation for ISP-bound traffic yielded "a troubling distortion" of the marketplace), at 9164-65 ¶ 29 ("[W]e conclude . . . that reciprocal compensation for ISP-bound traffic distorts the development of competitive markets.").

statutory provision to adopt permanent rules in the *ISP Remand Order*, had committed errors in reasoned decision-making.[4]

But even if the Commission were to determine that ISP-bound traffic is subject to section 251(b)(5), the Commission could and should still require bill-and-keep for this traffic under section 252(d)(2), whether or not the Commission also requires bill-and-keep for ordinary local traffic as well. The fact that traffic flows among carriers may not be symmetrical does not deprive the Commission of authority to order bill-and-keep. *See Reply Comments* at 34-39; *White Paper* at 12-16.

Section 252(d)(2) does not prevent the Commission from maintaining the current rules, which provide for a smooth transition to bill-and-keep. Section 252(d)(2) merely directs the Commission and the states to "provide for the mutual and reciprocal recovery by each carrier of costs *associated with* the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." 47 U S.C. § 252(d)(2)(A)(i) (emphasis added). Ample evidence in the record demonstrates that, under ordinary principles of cost causation, a CLEC's costs of serving an ISP are "associated with" the CLEC's knowing decision to serve a customer with obvious and predictable incoming-only traffic, not the LEC serving the ISP's residential subscribers.[5] The Commission itself has recognized that carriers' "traffic imbalances arise[e] from a business decision to target specific types of customers," and it criticized carriers that have made this choice to target ISPs for attempting to compete by shifting the resulting costs to other carriers whose customers happen to call those ISPs.[6] Even if those costs are deemed relevant for purposes of section 251(b)(5), bill-and-keep arrangements provide each carrier with an opportunity for "recovery" of these costs through end-user charges, thereby complying with section 252(d)(2).

Section 252(d)(2) itself resolves any doubt that bill-and-keep arrangements are permissible by expressly permitting the Commission to prescribe "arrangements that waive mutual recovery (such as bill-and-keep arrangements)." *Id* § 252(d)(2)(B)(i). As the legislative history of this "bill-and-keep savings clause" of section 252(d)(2)(B)(i) confirms, this clause thus permits "a range of compensation schemes, such as an in-kind exchange of traffic without cash payment (known as bill-and-keep arrangements)."[7] The Commission thus can, and should, resolve any ambiguity in this statutory language in favor of an appropriately robust construction of the "bill-and-keep savings clause."

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[4] *See WorldCom v FCC*, 288 F 3d 429, 432-34 (D.C. Cir. 2002).

[5] Record evidence demonstrates that the CLEC's costs are not *imposed* on the CLEC by the ISP subscribers' carrier; rather, they are *caused* by the ISP and *assumed* by the CLEC in choosing to serve the ISP. *See White Paper* at 13-15 (citing *1999 Ex Parte Submission*); *see also 2000 Ex Parte Letter* (*ex parte* presentation containing additional analyses by Dr. Taylor).

[6] *ISP Remand Order* at 9154-55 ¶ 5.

[7] S. Rep. No. 230, 104th Cong., 2d Sess., at 120 (1996).

While some CLECs have suggested that the Commission may not adopt section 251(b)(5) compensation rules that distinguish between ISP-bound calls and other traffic currently subject to reciprocal compensation, this is a red herring. As an initial matter, Qwest does not believe that any such distinction is necessary: Qwest has advocated in the broader Intercarrier Compensation docket that bill-and-keep apply to ISP-bound and non-ISP bound calls alike.[8] Moreover, nothing in section 251(b)(5) requires a single compensation rule for all kinds of traffic, and there are compelling reasons to treat ISP-bound traffic and "local" traffic differently as an interim step on the way to such a comprehensive rule. For one thing, as Qwest argues in the *White Paper*, ISP-bound traffic does not actually terminate locally with the ISP, instead terminating at an end point that is not itself "local." *See White Paper* at 8-9.

Second, dial-up Internet access calls have a much longer average hold time than non-ISP-bound calls,[9] making the payment of TELRIC-based traffic-sensitive reciprocal compensation rates wholly inappropriate. Those rates are set to allow the carrier to recover its non-traffic-sensitive call set-up costs over the duration of an average *voice* call.[10] In the case of ISP-bound calls, where the holding times are dramatically longer, the non-traffic sensitive call set-up costs are recovered many times over during the course of the Internet connection.[11]

Third, ISPs are not like other kinds of customers whose inbound calls currently give rise to reciprocal compensation obligations. While, as the D.C. Circuit noted in *Bell Atlantic*,[12] it is true that many businesses use their telephone lines primarily to receive incoming calls (*e.g.*, a local pizza establishment), these businesses are not primarily engaged in selling the communication itself (a pizza parlor sells pizzas, not a conversation with the chef). ISPs resemble common carriers because, like common carriers, they are in the business of selling the ability to communicate with others. Thus, even if the Commission concludes that ISP-bound traffic is subject to section 251(b)(5), the Commission should recognize that ISP-bound calls are indeed different from ordinary local traffic and should not be treated the same way. While having a single rule apply to all section 251(b)(5) traffic may be administratively convenient, the Commission may not rely on administrative convenience as an excuse to ignore the real

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[8] *See* Comments of Qwest Communications International Inc., Notice of Proposed Rulemaking, CC Docket No. 01-92 at 7-20, filed Aug. 21, 2001.

[9] *See* Kevin Werbach, *Digital Tornado The Internet and Telecommunications Policy*, OPP Working Paper Series No. 29, March 1997, Pg. 58.

[10] *2000 Ex Parte Letter* at 7-8; *1999 Ex Parte Submission* at 7-8.

[11] *2000 Ex Parte Letter* at 7-8; *1999 Ex Parte Submission* at 7-8.

[12] *Bell Atlantic*, 206 F 3d at 7.

differences between these categories of traffic that legitimately warrant different compensation rules."[13]

The Commission's suggestion in the *Local Competition Order* that, as a general matter, bill-and-keep arrangements are appropriate only where "traffic is roughly balanced"[14] does not deprive the Commission of authority to impose bill-and-keep for ISP-bound traffic. The Commission reached this conclusion as a matter of policy, not as a matter of statutory interpretation; rather than suggest that this is what section 252(d)(2)(B)(i) requires, the *Local Competition Order* simply found that "the advantages of bill-and-keep arrangements outweigh the disadvantages" only where traffic is balanced.[15] The Commission has before it an overwhelming amount of record evidence demonstrating that in the case of ISP-bound traffic, the balance tips the opposite way than predicted in 1996. Eight years of experience have demonstrated that a cost-based calling-party's-network-pays ("CPNP") approach inevitably leads to arbitrage and competitive distortions. Indeed, as described below, the Commission has expressly so found, and it may not disregard those findings now.

There is little question that such reasoning satisfies the standards set by the D.C. Circuit; indeed, the *WorldCom* court practically begged the Commission to rely on it. The court declined to vacate the *ISP Remand Order* because it found "there is plainly a non-trivial likelihood that the Commission has authority to elect" a bill-and-keep compensation rule. *WorldCom*, 288 F.3d at 434. And the court specifically cited sections 251(b)(5) and 252(d)(2)(B)(i) as the potential statutory sources for that authority. *Id* As Qwest's analyses demonstrate, the Commission will be on solid ground if it follows the D.C. Circuit's explicit lead.

II. Neither Reasoned Decision-making nor Reasonable Statutory Interpretation Permits the Commission to Interpret a Provision in the Act in a Manner that Undercuts the Purpose of the Act Itself.

If the Commission were to reverse course and decide that ISP-bound calls are subject to reciprocal compensation under section 251(b)(5), it would put itself in the position of once again facing rejection by the D C. Circuit. Requiring reciprocal compensation arrangements for ISP-bound traffic would contradict the Commission's detailed findings that such arrangements frustrate the policies of the Act. Such an order would be extremely difficult to sustain as either reasoned decision-making or as a reasonable interpretation of an ambiguous statute under step

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[13] *See Petroleum Communications, Inc v. FCC*, 22 F.3d 1164, 1173 (D.C. Cir. 1994) ("An agency must justify its failure to take account of circumstances that appear to warrant different treatment for different parties.").

[14] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16055 ¶ 1112 (1996) ("*Local Competition Order*").

[15] *Id*

two of *Chevron*.[16] The Commission is a creature of its enabling statute and is without power to enact rules or regulations that are inconsistent with the intent of Congress.[17] Yet, reversal of the Commission's position on the proper compensation regime for ISP-bound traffic would be tantamount to such an action: as explained below, the Commission has already found that reciprocal compensation for ISP-bound traffic would frustrate the purpose of the Act.

In the *ISP Remand Order*, this Commission found that reciprocal compensation for ISP-bound traffic has been destructive of local competition and thus has directly undermined the goals of the Act. The Commission found that reliance on reciprocal compensation regimes for ISP-bound traffic "has created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access markets."[18] In particular, the Commission observed that "[b]ecause traffic to ISPs flows one way, so does money in a reciprocal compensation regime," and as a result, "this led to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, *as Congress had intended to facilitate with the 1996 Act*; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels."[19] In fact, the Commission found "convincing evidence in the record that at least some carriers have targeted ISPs as customers merely to take advantage of these" arbitrage opportunities.[20]

Based on these findings, the Commission went on to hold that "the application of a CPNP regime, such as reciprocal compensation, to ISP-bound traffic *undermines the operation of competitive markets*."[21] This is due to the fact that "ISPs do not receive accurate price signals from carriers that compete, not on the basis of the quality and efficiency of the services they provide, but on the basis of their ability to shift costs to other carriers."[22] Alternatively, "[e]fficient prices result when carriers offer the lowest possible rates based on the costs of the

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16 *See Chevron U S A , Inc v Natural Resources Defense Council*, 467 U.S. 837 (1984).

17 *See id.* at 843 ("The judiciary . . . must reject administrative constructions which are contrary to clear Congressional intent"), *see also Federal Election Comm'n v Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (holding that Courts may invalidate agency adjudication or rulemaking which is "inconsistent with the statutory mandate or that *frustrates the policy that Congress sought to implement*")(emphasis added).

18 *ISP Remand Order*, 16 FCC Rcd at 9153 ¶ 2.

19 *Id.* at 9162 ¶ 21 (emphasis added).

20 *Id.* at 9153 ¶ 2.

21 *Id* at 9183-84 ¶ 71 (emphasis added). *See also id* at 9164-65 ¶ 29 ("reciprocal compensation for ISP-bound traffic distorts the development of competitive markets").

22 *Id.* at 9183-84 ¶ 71.

services they provide to ISPs, not when they can price their services without regard to cost," an opportunity that exists when reciprocal compensation is required for ISP-bound traffic.[23] Thus, because of concerns that "viable, long-term competition among efficient providers of local exchange and exchange access services cannot be sustained where the intercarrier compensation regime does not reward efficiency and may produce retail rates that do not reflect the costs of the services provided," the Commission concluded that "a compensation regime, such as bill and keep, that requires carriers to recover more of their costs from end-users" is more likely to avoid the problems of regulatory arbitrage and market distortion that result from requiring reciprocal compensation regimes for ISP-bound traffic.[24]

These findings are not only correct; the record compels them. Further, the *WorldCom* court did not question the validity of these findings.

As the D.C. Circuit has recognized, "resolution of an ambiguity in a statute, if it has consequences, inevitably requires the agency to consider competing policy objectives."[25] As such, "review of an agency's construction of an ambiguous statute is review of the agency's policy judgments."[26] Reviewing courts "are to defer" to an agency's policy judgments, but courts "cannot accept [policy judgments] if they seem wholly unsupported or if they conflict with the policy judgments that undergird the statutory scheme."[27] Here, the Commission has concluded, based on an extensive record, that reciprocal compensation arrangements for ISP-bound traffic frustrate the policy of the Act to promote competitive markets in the telecommunications industry. If the Commission were to require or permit reciprocal compensation for ISP-bound traffic in the face of these policy findings, it would be implementing a policy judgment that is both unsupported by the record (which has not been supplemented) and contrary to the policy of the Act. Such a conclusion would not be accurate either as a matter of interpreting an ambiguous statute or as a matter of developing a reasonable rule under the Administrative Procedure Act ("APA").[28] In any event, such an action would not

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23 *Id.*

24 *Id.*

25 *Wagner Seed Co v Bush*, 946 F.2d 918, 923 (D.C. Cir. 1991).

26 *Health Ins Ass'n of Am v Shalala*, 23 F.3d 412, 416 (D.C Cir. 1994).

27 *Id.*

28 *See Chevron*, 467 U.S. at 843 ("The judiciary . . . must reject administrative constructions which are contrary to clear Congressional intent"); *see also Federal Election Comm'n v Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (holding that Courts may invalidate agency adjudication or rulemaking which is "inconsistent with the statutory mandate or that *frustrates the policy that Congress sought to implement*")(emphasis added).

constitute responsible or reasonable regulation and would be highly unlikely to withstand judicial review.[29]

III. The Commission Could Not Reverse Its Intercarrier Compensation Rules Without Conducting Another Round of Notice and Comment.

The last round of comments on this subject was filed more than two and a half years ago, and the industry has never been afforded the opportunity to comment on the D.C. Circuit's remand in *WorldCom*. (Indeed, the last round of comments on this subject was filed in November 2001 as part of the *Intercarrier Compensation NPRM*[30] that was released in tandem with the *ISP Remand Order* under review in *WorldCom*.) The Commission has already held that the existing record requires a finding that reciprocal compensation for ISP-bound traffic frustrates the plain purpose of the Act. Therefore, the Commission cannot reverse its position and apply reciprocal compensation to ISP-bound calls while relying on the existing record.

As the D.C. Circuit has held, "[s]ection 553 of the Administrative Procedure Act requires agencies to provide notice of a rule thirty days before it becomes effective and to give the public an opportunity to comment on it "[31] This notice-and-comment requirement serves the purpose of "allowing interested parties the opportunity of responding to proposed rules and thus allowing them to participate in the formation of the rules by which they are to be regulated."[32] Moreover, "[t]he more expansive the regulatory reach of these rules . . . the greater the necessity for public comment."[33] If the Commission were to reverse its previous conclusions regarding its interpretation of section 251(b)(5)'s reciprocal compensation requirements, it would be making a new rule [34] This new rule would have an expansive regulatory reach affecting almost all carriers. As such, under the APA's notice-and-comment requirements, the Commission is obligated to give all affected carriers the opportunity to comment on the Commission's proposed rule. It

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[29] *See also Mountain Side Mobile Estates Partnership v Secretary of Housing & Urban Dev* , 56 F.3d 1243, 1248 (10th Cir. 1995)("[n]o deference is warranted if the interpretation is inconsistent with the legislative intent reflected in the language and structure of the statute or if there are other compelling indications that it is wrong.").

[30] Notice of Proposed Rulemaking, Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, 16 FCC Rcd 9610 (2001).

[31] *Tennessee Gas Pipeline Co v FERC*, 969 F.2d 1141, 1144 (D.C. Cir 1992); *see also* 5 U S C. § 553(b)-(d).

[32] *American Fed'n of Gov't Employees v Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

[33] *Id*

[34] *See* 5 U.S.C § 551(4).

would be reversible error for the Commission to promulgate a new rule without issuing a notice and allowing affected parties a chance to comment.[35]

The APA provides an exception to its notice-and-comment requirements in such situations "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest "[36] The D.C. Circuit has repeatedly held that "exceptions to the notice and comment requirements will be narrowly construed and only reluctantly countenanced."[37] Furthermore, "the exceptions should be invoked only in emergency situations when delay would do real harm."[38]

This narrow exception cannot apply here. Nothing would make a new round of notice and comment impracticable, unnecessary, or contrary to the public interest. The Commission has already waited two years following the D.C. Circuit's remand to act; hence, a short further delay to permit compilation of a sustainable record cannot be viewed as impracticable.

In sum, the Commission does not possess valid reasons for invoking the exception to the notice-and-comment procedures. Instead, it must give notice and offer all affected parties the opportunity to provide comments on any proposed reversal of the Commission's still existing rules concerning the correct interpretation of section 251(b)(5) and the proper intercarrier compensation regime for ISP-bound traffic.

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The D.C Circuit made clear that the Commission could "re-adopt" its current rules if it engaged in the proper analysis. The Commission has already said what compensation rule it believes Congress intended, and the Commission will be on very shaky ground if it takes a course of action that it has already found would undermine Congress's intent. The Commission must again act to prevent the economic waste and irrationality that result from allowing carriers to collect reciprocal compensation for ISP-bound traffic. The existing rules are just and reasonable and should be continued. Any other course of action would be to invite yet another court reversal in this docket.

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35 *See Sprint Corp v FCC*, 315 F.3d 369, 373-77 (D.C. Cir. 2003).

36 5 U.S.C. § 553(b)(B)

37 *Action on Smoking and Health v Civil Aeronautics Board*, 713 F.2d 795, 800 (D.C. Cir. 1983); *see also, e g American Fed'n of Gov't Employees*, 655 F.2d at 1156; *New Jersey Dep't of Environmental Protection v EPA*, 626 F.2d 1038, 1045 (D.C. Cir 1980); *Humana of South Carolina, Inc v Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978).

38 *Action on Smoking and Health*, 713 F 2d at 800.

Respectfully submitted,

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Enclosures